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van Schooten, H.

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War as an Institutional Fact: Semiotics and Institutional Legal Theory

Hanneke van Schooten

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Abstract In institutional legal theory, norms and facts are reciprocally operating elements: an interplay in which meaning construction is closely connected with acting: the pragmatic understanding of legal language in terms of its uses. With the semiotic elements of institutional theory, extended by the notion of 'semiotic groups', an analytical framework can be constructed to analyze a case study on the shifts in the concept of war which have taken place since the 1945 UN Charter and in the aftermath of 9/11. The semiotic aspects of the institutional approach can offer insight into the complexity of the processes of meaning attribution in the field of law and war.

Introduction

Semiotics of law is far from a single theory. Apparently, legal semiotics is as diverse as legal theory. Moreover, different concepts of law in legal theory may involve semiotic elements [1, pp. 9–12]. In institutional legal theory, for instance, law and its corresponding conduct are analyzed by emphasizing institutional facts, and by explaining the existence of norms as thought objects, on the one hand, and observable social institutions which correlate with it, on the other [2, pp. 6–7]. Indiscernible norms and individual action or social arrangements, externally observable in character, are two sides of the same coin. In the institutional point of view, 'one cannot assign or even speak of priority' [2, pp. 25–26], for norms and acts are reciprocally operating elements [2, p. 20], an interplay in which meaning attribution is strongly connected to acting.

Unlike the reciprocal approach of law in the institutional legal theory, the relationship between norm and fact is traditionally presumed to be unilateral in

H. van Schooten (✉)
Tilburg University, Tilburg, The Netherlands
e-mail: J.vanSchooten@uvt.nl

character and is dominated by linear causality. Legislation is prior to governmental interference with the freedom of citizens and their conduct—one of the requirements of the Rule of Law principle—and it is regularly seen as a tool for influencing prospective behaviour.[1] In this view, law functions as means to achieve certain goals, i.e., legal words used as tools [3; 4 p. 247]. The concept of legislation as an instrument of social control, also known as 'social engineering' [5, pp. 247–252], presupposes that the rule causes conduct in a unilateral way. The underlying assumption is that the rule's legal message is communicated correctly, and is successfully 'transported' one-sided from 'law-giver' to 'law-taker', from sender to receiver, in order to become materialized into conduct.

The relationship between law and fact, between rule and conduct, will be analyzed, applying the institutional viewpoint. In particular in the relationship between the law of war and actual warfare, the semiotic-pragmatic institutional understanding of legal language in terms of its *uses* may provide an insight into the complex processes of transformation and shifts in the concept of war after the 1945 UN Charter and in the aftermath of 9/11. The developments and the shifts in the field of war and law will be described in a case study, a case in point of the complex processes of meaning construction in the relationship mentioned.

In Sect. 2, the semiotic aspects of institutional legal theory are scrutinized. The case study on the shifts in de concept of war will be described in Sect. 3 and will be analyzed from a semiotic-institutional viewpoint in Sect. 4. The relationship between legal rules of war and patterns of actual warfare will be highlighted with respect to the assumption of linearity between rules and acts and the processes of sense construction in this relationship. In Sect. 5, conclusions will be drawn.

Law and Fact: Linear Causality or Interplay?

Introduction

The Rule of Law, the central principle of the constitutional *Rechtsstaat*, involves the requirement that a legal rule can only be applied *after* it has been validly enacted. A rule can never be applied with retroactive effect. Thus, the norm is always prior to (the correction of) prospective behaviour and is, in this sense, a tool for social control and the shaping of society [6]. The Rule of Law guarantees legal certainty. Citizens can take cognizance of the legal rule's message and know how to act upon its provisions. The Rule of Law implicitly presupposes a clear-cut formulation of the rule's message and its univocal meaning.

This view of legislation became central after de Second World War: the further development of the welfare state with legal rules used as tools emphasized the optimism of creating a new society: the actualization of the ideas of the *iustitia distributiva*. However, this instrumental concept of law became a subject of

[1] Involving the material as well as the formal dimension of legislation. This paper concentrates on the former, the latter is less relevant here.

discussion under the pressure of the regulation crisis, during the 1980s,[2] resulting in a new concept of legislation, in which the use of open norms in legislation and reciprocal aspects of self-regulation became more important. This new concept of legislation was based on theoretical models of legal communication, in which Teubner's model of 'reflexive law' and 'autopoiesis' played a dominating role [7], pp. 239–285; [8]. (In Sect. 2.4, Teuner's model will be scrutinized.) Generally, this new approach raised new challenges. Particularly when rules unilateral guarantee citizens constitutional rights and democracy, reciprocal elements challenge the basic principles of the *Rechtsstaat*.

Institutional Legal Theory

In their book *An Institutional Theory of Law*, Neil MacCormick and Ota Weinberger give a definition of what they call an institutional fact. As opposed to 'brute facts', i.e., facts that solely have to do with the physical existence of the material universe, independent of the human will [2, p. 9], the essential feature of institutional facts is that they are rule-defined. Similarly, the acts of playing chess are dependent from, and cannot exist without, the rules of chess. Institutional facts involve duration in time, independently of both, specific location in space, and specific physical characteristics. Institutional facts are [2, p. 10]

> facts in virtue of being statable as true statements. But what is stated is not true simply because of the condition of the material world (…). On the contrary, it is true in virtue of an interpretation of what happens in the world, an interpretation of events, in the light of human practices and normative rules.

In the institutional view, the existence of law is not just fact [3], nor is law separated from the facts [9], but the existence of law is an *institutional* fact. It is essential for the institutional approach that the existence of a legal system forms the *interplay* between a normative system and an observable social reality [2, p. 20], even when norms are considered as ideal entities, not available for direct observation, but only as mental pictures. In this way, the existence of an indiscernible norm as an ideal entity is inextricably related to the existence of observable patterns of behaviour in social reality. That is, events and human conduct as institutional facts, obtain their meaning in the light of rules [1, p. 10; 2, p. 180].

That institutional facts involve duration in time is the result of a triadic structure, in which institutive rules, consequential rules and terminative rules play an important role [2, p. 20, 51–53]. Examples of institutional facts and legal institutions are, for instance, contract and right of ownership. These institutional facts have a temporal existence: they are set up, that is, instituted by the performance of some *act*. For example, by getting on a bus and paying a fare to the driver, a contract comes into being. The existence of a contract between each passenger and the bus corporation is obvious not a matter of physical fact. Nevertheless, getting on a bus

[2] The relationship between norm and conduct became the subject of several legal theories, in particular with the decreasing effectiveness and the increasing complex of statute law since the beginning of the 1980s.

and paying fare becomes a centrally significant fact that brings the contract into existence. This pattern of observable social behaviour initiates the contract of carriage and forms the institutive rule of contract [2, pp. 49–50]. The institutional rule produces a whole set of further legal consequences (consequential rules), such as further rights and powers, duties and liabilities. If, for instance, there should be a crash and a passenger gets injured, a whole set of rules, resulting from the existence of the contract, is available for the passenger to seek recompense in the law [2, pp. 49–50]. Since these consequential rules continue in existence for a period of time during which they generate legal consequences, it is also necessary to provide for its terminations: the terminative rules.

From the view that institutional facts are rule-defined and have a temporal dimension in the sequence institutive-consequential-terminative, it follows that institutional facts can be initiated and finished, forming a sequence of different legal institutions, in complex chains, 'almost like biological molecules' [10, p. 21]. Since the institutive rule presupposes that the transformations from one legal institution into the other, must be performed by *acts*, acts not only constitute an institutional meaning, but they are also the external manifestations of an institutional meaning.

Thus, in the institutional point of view, 'one cannot assign or even speak of priority' [2, pp. 25–26], for norms and acts are reciprocally operating elements [2, p. 20], an interplay in which meaning attribution is greatly connected with acting. Institutional facts can generate 'a proposition, whose truth not merely depends upon the occurrence of acts or events in the world, but also upon the application of rules to such acts or events' [2, p. 51; 11, pp. 50–53]. Empirical acts generate institutional meaning defined by rules. This approach diametrically opposes the classical view of legal rules, that is, the idea that goal-oriented legislation determines conduct in a linear-causal way. In the institutional approach, however, acts form the constitutive momentum and point of departure for the construction of meaning. A legal system forms the *interplay* between a normative legal language and an observable social reality. As stated before, there is no priority of the one over the other, since norms and acts are reciprocally operating elements.

The institutive/terminative rules presuppose that the transformations from one legal institutions into another—leading to a sequence of legal institutions in complex chains—is performed by acts. The legal system is conceived as the whole of conceptual building blocks: acts, perceived by our senses as an external manifestation and the institutional meaning of these acts. In this pragmatic approach, meaning is obtained and attributed in terms of use and communication. Thus, aspects of sense-making play a substantial role in institutional legal theory [1, p. 180]. Nevertheless, the question of how meaning is constituted in the reciprocal processes of communication and by whom remains unanswered. How can this implicit idea in the institutional view be made more explicit? In the next section this question will be analyzed.

Legal rules as 'Thought Objects'

The observation that legal rules refer to 'supersensible' [3, p. 223] mental entities is considered to be one of the essential elements of law. Unlike the institutional legal theory—which starts from the viewpoint that law consists of *two dimensions*,

i.e., normative institutions (a set of rules) and real institutions (a set of patterns of behaviour) [2, pp. 1–27]—Ruiter creates a model with *three dimensions* [12, pp. 24–25]:

(i) the legitimate legal rule (the formal dimension), which comprises a message (the material dimension);
(ii) the acts of the application of the rule by an official, and, in the case of a conflict, a judge;
ii. a degree of rule-conforming patterns of behaviour in social practice.

Given the relationship between words and reality described above, it has been concluded that, within these three categories, only subsystems (ii) and (iii) are *discernible* [12, p. 25]: in other words, the acts of the official applying the rule are *perceptible* (and, in the case of a conflict, the decision of the judge, both testing factual behaviour against fictitious law (see ii)) and the rule-conforming patterns of behaviour are *observable* in social practice (see iii). The legal rule itself is an indiscernible construct; it is *thought* to be the basis of the two other subsystems: an ideal entity to be distinguished from physical things [13], Iii). The imaginary reality of the rule's meaning can be distinguished in its perceptible application, that is, by acts of officials, or, in the case of a conflict, by the acts of the judge. Only *by acting* the institutional meaning is expressed. Wittgenstein's frequently quoted 'the meaning is in the use' also seems to be relevant in this context [14, p. 43].

In Ruiter's more sophisticated model involving three subsystems, in particular the second category of this model—i.e., (ii) the acts of application of the rules by officials, and, in the case of a conflict, the acts of the judiciary—is relevant in this paper and will be analyzed in its relationship with (i) rules and (iii) conduct.

Observable social practices express the existence of institutional meaning in the light of the rules. This interplay is not exclusively restricted to the relationship between normative and real institutions, as developed by MacCormick and Weinberger, but takes place twice in Ruiter's model. Firstly, it takes place when the rule is applied by officials. When a conflict arises about the application of the legal rule, the Court has the competence to take a final decision. Both police officers and judges test the factual conduct against the institutional meaning of the fictitious rule. Both 'groups' have their own framework of interpretation. This phenomenon will be subject of analysis in the next section.

Semiotic Groups, Social Sub-Systems and Practices

The view of law as institutional fact implies that law cannot exist in the absence of two empirical conditions: first, the existence of patterns of conduct, and secondly, the existence of some group which actually attributes meaning to the observable acts. Although institutional legal theory does not explicitly mention an interpreting group, implicitly, the existence of such a group, which actually does attribute meaning to the acts, is assumed [1, p. 179]. The statement that 'the natural unit of sociolinguistic taxonomy is not the language but the speech community' [15, p. 56] is connected to a range of sociolinguistic studies that draw the attention, in particular, the theoretical applications that can be observed in legal contexts.

Professional languages within the 'legal system', for instance, have sufficient peculiarities to form a barrier to comprehension by those not members of the group. Here we are in the presence of a group defined by language: a 'semiotic group' [16, p. 6; Jackson 1995, p. 96]. In the broadest of terms, the definition of a semiotic group is a group (a professional group, for instance) which makes sense of law in ways sufficiently distinct from other groups [16, p. 6]. The legal system comprises a series of interacting semiotic groups: legislatures, superior court judges, doctrinal writers, police, crown administrators, etc. The system of signification, used by each of these groups reinforce their self-identity in relation to other groups within the legal system.

The notion of semiotic groups, although different in many aspects, is in essence similar to the notion of segmentation of society into social groups—'social sub-systems'—developed by the German legal scholar and sociologist Teubner, in his book *Law as an Autopoietic System* [8]. Teubner focuses on the shift from the 'formal rationality' of law of the 19th century to the substantive and goal-oriented law in today's regulatory state. By analysing evolutionary models of law and society (Luhmann and Habermas), his objective is to outline an approach to change in law and society that will allow us to see the current situation as a 'crisis' of legal and social evolution and thus to situate the accounts of legalization/delegalization and form/substance in a more comprehensive theory. In the descriptions of the neo-evolutionary theories of the shift mentioned, it is striking that all emphasize the autonomy of the legal system. 'For the neo-evolutionists, legal autonomy means that the law changes in reaction only to its own impulses, for the legal order—norms, doctrines, institutions, organizations—reproduces itself' [8, p. 36]. This self-referential character of legal structures does not mean, however, that the legal system is totally isolated from its social environment. 'Legal structures (…) reinterpret themselves, but in the light of external needs and demands. This means that external changes are neither ignored, nor directly reflected according to a 'stimulus-response scheme [8, pp. 43–44]. Law, economy, politics, professional groups and disciplines, etc. are separate 'systems' of society, which have their own rationality. The industrial sector, for instance, aims at profit, while the legal system aims at regulating this field in the light of pollution problems, or regulating wages and working times of the labourers. The autonomy of these functional 'sub-systems', results in the fact that they are relatively closed in their internal self-organisation, but partly open to external information. If legal information 'enters' a sub-system, for instance the industrial sector, the information will be transformed in the system's own distinctions, codes and meanings [8, pp. 97–98].[3]

Teubner's approach of social groups seems to have essential points in common with the more broader definition of MacIntyre's 'practices'. MacIntyre defines 'practices' as 'any coherent and complex form of socially established cooperative human activity' [18, p. 187] bound together by rules. Every practice creates what MacIntyre calls 'internal goods'; that is, immaterial goods that cannot be known or acquired in any way other than by participation in that particular practice [18,

[3] Empirical research by Sally Falk Moore in the New York clothing industry may illustrate this theoretical notion [17].

p. 189]. Which means that 'those who lack the relevant experience are incompetent thereby as judges of internal goods.' [18, p. 189] In this view, particular practices differ from each other, since practices create their own internal framework for interpretation. Practices originate and develop from within: the practice is self-referential. When faced with a change in its environment, a practice will react in terms that reflect its own internal organization and its own internal self-understanding. Like Teubner's social sub-systems and Jackson's semiotic groups, practices will always react to its environment in terms of its own internal organization and corresponding codes. Outside information or interaction with other groups or practices will be transformed in the system's own distinctions and meanings.

When we extrapolate the line, set out in Teubner's theory, and apply it to the legal system, the judiciary, the officials and the legislature may be regarded as three distinct groups. As a result of the phenomenon that rule-information between sub-systems is not simply 'transported' but is distorted while entering the other system, different sub-systems make sense of legal information distinctly from other sub-systems. The degree of autonomy of the interpreting groups correlates with the 'resistance' they offer against different (dissenting) interpretations of other groups, as well as with their power to impose their own interpretation on other groups. The notion of semiotic groups and the institutional-pragmatic approach form together the elements for an analytical instrument. In the next paragraph, the case study on the shifts on the concept of war will be described (Sect. 3) and will be analyzed by applying the institutional-pragmatic framework including its semiotic aspects, in Sect. 4.

Warfare and the Law of War: A Case Study

Article 96 of the Dutch Constitution and the Law of War

Article 96 of the Dutch Constitution guarantees democratic procedures for a declaration of war.[4] Since a decision to start a war has far-reaching consequences for citizens, the government needs prior approval from Parliament. With the declaration of war, the normally existing 'state of peace' is transformed into a 'state of war'. In a 'state of war', the law of war (*jus in bello*) binds the belligerent parties.[5] This clear dividing point between war and peace has its origins in the work of the 17th century famous Dutch jurist and humanist Hugo Grotius. In his book *De Jure Belli ac Pacem,* Grotius stated that '*inter bellum et pacem nihil est medium*' [19, p. 852].[6] Thus, war and peace are to be distinguished as two mutually exclusive and jointly exhaustive legal states. The declaration of war is the dividing point between the two. There is nothing in between. This point of view dominated

[4] Article 96 states: 'A declaration that the Kingdom is in a state of war shall not be made without the prior approval of parliament.' In Dutch the Article reads: '*Het Koninkrijk wordt niet in oorlog verklaard dan na voorafgaande toestemming van de Staten-Generaal.*'

[5] The law of war—*jus in bello*—concerns acceptable practices while engaged in war, to be distinguished from the *jus ad bellum,* which concerns the law on just causes for starting a war.

[6] 'There is nothing between war and peace.'

doctrine until the beginning of the 20th century [20, p. 285]. After the Second World War, it was clear that this distinction no longer held.

In 1945, after the great disaster of the Second World War, the United Nations Charter was enacted prohibiting the threat or the use of force between states.[7]

Due to the prohibition of interstate force, the declaration of war, laid down in Article 96 of the Dutch Constitution, fell into disuse. However, the UN Charter leaves some room for the declaration of war, that is, in case of self-defence, after a military attack by another state.[8] With respect to this, it can be concluded that the scope and the meaning of Article 96 was fundamentally transformed. It changed from a constitutive statement that starts a war *de facto* and *de jure*, to a mere declaratory statement, i.e., the legal recognition of an already existing situation of war [21, p. 102; 22, p. 173]. However, although the substantive meaning of Article 96 was dramatically transformed, it is remarkable that the text of the Article remained unchanged.

A new Category of War?

As a result of the prohibition in the UN Charter, the 'state of war', no longer comes into effect. This has consequences for the applicability of the law of war, that provides rules for warfare, like the use of weapons, the treatment of war prisoners, the sick and the wounded, and the protection of civilians in times of war, as laid down in the Geneva Conventions.[9] In principle, the law of war only applies in a legal state of war, which, as said, no longer occurs. However, *de facto* warfare can be observed: acts of war, without bearing the name 'war' or without having the legal status of 'war'. This phenomenon raises the question of whether the law of war applies to such war situations. The answer must be in the negative.

This undesirable consequence was discussed in the 1950s and resulted in a change of the rules of the Geneva Conventions,[10] making them applicable not only to a state of war, but also in all situations of *armed conflict* between two or more states even if they are not recognized as war by one of the parties. The Dutch Penal Code (*Wetboek van strafrecht*), too, was changed in the same way, in order to make

[7] Article 2(4) UN Charter: 'All Members shall refrain in their international relations from the thread or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

[8] Article 51 of the UN Charter states: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

[9] The First, Second, Third and Fourth 1949 Geneva Conventions and the 1977 Additional Protocols I and II together form the core of international humanitarian law, the *jus in bello,* the law of war.

[10] Article 2 of the First Geneva Convention states: 'In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war *or of any other armed conflict* which may arise between two or more of the High Contracting Parties, *even if the state of war is not recognized* by one of them.' (My italics).

crimes of war also applicable in situations of armed conflict not being a state of war.[11]

By changing the Geneva Conventions in addition to the two mutually exclusive (i) states of peace and (ii) states of war, a new, third category came into existence: (iii) the armed conflict. Being neither peace nor war, the category of an armed conflict—a *status mixtus*—is situated 'somewhere' between the state of peace and the state of war. With respect to these three categories, the applicability of the law of war is clear.[12]

Next to the category of armed conflicts, another category of war acts came into being, the legal status of which fundamentally lacks clarity [25, pp. 134–153]: peacekeeping missions. This new category involves military actions in foreign states, based on the rules of the UN Charter,[13] in order to maintain or restore peace and international security. Article 42 of the Charter states that the collective action can be taken not only after a *breach* of the peace, but in all cases where the Security Council determines that a *threat* to the peace exists. Not only the number, but also the size, functions, and strategies of peacekeeping missions have been altered. The function of peacekeeping missions has moved beyond interposition and cease-fire monitoring to include election supervision, nation building and a wide range of other functions. Peacekeeping has also adopted more coercive tactics and strategies, making it increasingly less distinct from collective enforcement actions. The presence of international military units in Afghanistan and Iraq can be taken as examples for peacekeeping missions with a more robust character. These collective operations, legitimized by the UN Charter and carried out by the Member States, are qualified as 'peacekeeping',[14] but are in fact military operations, characterized by warfare. The lack of clarity about the legal status and the legal meaning of these missions causes severe problems. In previous publications, I have amply analyzed the issue [23, 24]. The uncertainty about the legal meaning of these missions is also reflected in the case law.[15] In particular, the *Eric O.* case is a striking example for the unclear legal status of the peacekeeping mission in Iraq.[16]

[11] A new Article 107a Penal Code was added, which states that the criminal offence of Article 102—aiding the enemy in *wartime*—is also applicable 'in the event of an armed conflict that cannot be designated a war.' (My italics).

[12] However, it is not completely clear what the definition of an armed conflict is. For instance, the question of whether an internal civil war has to be considered an armed conflict [23, 24].

[13] Chapter VII of the UN Charter, in particular Article 42.

[14] Attempts to classify different types of peacekeeping have been quite elementary. Since the end of the Cold War, scholars have begun to refer to more recent operations as 'new peacekeeping' or 'second generation' missions. Other classifications implicitly combine mission function, timing, and level of coercion, to derive the popular categories of peacekeeping, peacemaking, peace building, and peace enforcement, although the actual meaning of these terms varies widely [26].

[15] *Eric O.* case, Gerechtshof Arnhem [Arnhem Court of Appeal], 21-006275-04, www.rechtspraak.nl, LJN: AT4899. *Slapende mariniers* [Sleeping Marines case], Rechtbank Arnhem [Arnhem District Court], 1 maart 2004, *NJ* 2004, 206.

[16] Resolution 1441 (Security Council, 8 November 2002), gave Iraq 'A final opportunity to comply with its disarmament obligations.' Efforts aimed at a new Council resolution authorizing the invasion in Iraq, but they did not succeed. Iraq was nevertheless invaded on 20 March 2003 without an authorization of the Security Council. Afterwards, Resolution 1483 (22 May 2003) affirmed that the United States and the

The Eric O. Case

Dutch sergeant-major Eric O. took part in the peacekeeping mission in Iraq. While fulfilling his duties and tasks as the commander of the QRF Battalion (Quick Reaction Force), O. fired a warning shot in a threatening situation that by accident killed an Iraqi, on 27 December 2003. O. was arrested as a suspect on 31 December 2003. He was directly flown to the Netherlands, where he was imprisoned and prosecuted by the Public Prosecutor for manslaughter on the basis of Article 307 of the Dutch Penal Code, which is valid law in times of peace. However, the judges of the Arnhem District Court (Military Division), emphasized the special situation of warfare in which the act had taken place, pointing at the Rules of Engagement (ROE),[17] i.e., specific rules enacted for the mission in Iraq, and acquitted Eric O. of the charge.[18]

The prosecutor appealed against the Arnhem District Court's decision. The attitude of the Public Prosecution Service was later on qualified by the Arnhem Court of Appeal as one of a particular tenacity. The Advocate General of the Public Prosecution Service held to his demand of manslaughter (Article 307 Dutch Penal Code) by stating that the peacekeeping mission in Iraq was a state in which two competing parties without sovereignty claims fight each other, which had led to an internal state collapse, in which Dutch military units intervened on behalf of the UN. For this reason, the use of force was excluded. He answered the question of whether the Netherlands, as a military party, was involved in a conflict in Iraq in the negative. Eric O. was not a military component of a party involved, but an expert on mission. The status of the Dutch military units was that of 'regular trooper' responsible for 'non-military tasks.' Thus no rules were applicable other than those of the common Dutch Penal Code, the rules that apply in times of peace.

The Arnhem Court of Appeal, again, concentrated on the ROE, as a part of the Memorandum of Understanding, based on Resolutions 1483 and 1511 of the UN Security Council, which were evidently applicable, valid rules for the mission in Iraq, in particular Article 151 of the ROE, which allows the passing of warnings.[19] The warning shot fired by O. could not be regarded as substantially imprudent, negligent, or careless. The Court of Appeal, too, acquitted O. of the charge.[20]

Footnote 16 continued
United Kingdom had responsibility for Iraq as the "occupying powers under unified command". Its three most important features are that it empowered the US–UK coalition, making it the legitimate and legal governing and peacekeeping authority; recognized the creation of a transitional governing council of Iraqis; and removed all sanctions against Iraq that were placed upon the former regime of Saddam Hussein, additionally terminating the (now unnecessary) Oil-for-Food Program.

[17] In particular, Article 151 of the ROE.

[18] LJN: AR4029, *Rechtbank Arnhem* [Arnhem District Court], 05/097011-03.

[19] Article 151 of the ROE states: 'Passing of warnings to any person, aircraft, vehicle or vessel by any means in circumstances where MND(SE) forces or elements under MND(SE) protection or the mission are threatened or where the passes of warnings is necessary for purposes of execution of the mission is authorized.' MND(SE) stands for Multinational Division (South East).

[20] *Eric O.* case, Gerechtshof Arnhem [Arnhem Court of Appeal] 21-006275-04, www.rechtspraak.nl, LJN: AT4899.

This specific case, expressing the lack of clarity with respect to the legal meaning of actual warfare, puts the instrumental and unilateral concept of legislation under discussion. It raises the question of whether reciprocal elements exist in the relationship between rule and conduct, and how the meaning of warfare is constructed in this relationship. Here, actual warfare was taken as a point of departure; a constitutive momentum for meaning construction within different professional groups results in different legal meanings of these war acts. In the next section this paradoxical issue will be scrutinized, using institutional legal theory as an instrument of analysis.

Shifts in the Concept of War: A Semiotic-Institutional Analysis

A unilateral Relationship or an Interplay?

If war is considered to be a legal institution and acts of war to be institutional facts, what can be concluded with respect to the relationship between the rule as a thought object [2, p. 6] and discernible patterns of conduct? Is it, as is generally presumed, an unilateral concept of legislation, in which the rule's legal message is 'transported' in a one-sided 'flow model' of information from 'rule-giver' to 'rule-taker'? What constitutes the meaning of warfare in this relationship and by whom?

In the institutional approach the existence of law as legal institutions is a matter of what is actually existent in social reality: acts constitute institutional facts that materialize indiscernible rules. The institutional view emphasizes the mutual relationship between socially existent norms and observable features of social life and take the basis of legal dynamics to lie in this very interplay [2, p. 20]. Taking the act as a constitutive momentum, the rule does not exclusively determine conduct in an instrumental way, as the classical approach of goal-oriented legislation assumes, but the social acts constitute legal institutions and are embedded in sets of rules, that create an institutional landscape [27, p. 156].

Article 96

With respect to the case study on the shifts in the concept of war, related to the fundamental changes in Article 96 of the Dutch Constitution, it can be stated, in the first place, that the meaning of the Article (not its text, which remained unchanged) was transformed by political practice, that is, in political discourse, in governmental acts and decisions on war, as well as in the existence of actual warfare. Thus, the transformation of the meaning of Article 96, guaranteeing citizens the right of democracy in the far-reaching decisions on war, was *not* initiated by the legislature and Parliament, as it should be.[21] This means that the Article's message did not unilaterally impose its democratic procedures on the government by prescribing how to act when taking a war decision. On the contrary, social and political

[21] Changing the text of Articles in the (rigid) Dutch Constitution requires lengthy procedures and new elections.

practices determined in a reciprocal way the meaning transformation of the Article, resulting in an erosion of democracy principle and an undermining of the principle of the Rule of Law. It has to be noticed that reciprocity in the relationship between norms and acts, which is generally seen as a positive element, as an alternative, participating form of the traditional representative principle of democratic, has rather negative consequences here.

Peacekeeping Missions

With respect to the new category of war—the peacekeeping missions—it was stated that this category came into being in the interplay between the rules of the UN Charter and the patterns of actual warfare as a social phenomenon. Taking the peacekeeping mission in Iraq as an example, it can be stated that it resulted from the ideal of the Charter, banning war and creating peace by force, and finally ending in horrors of warfare, thousands of people injured and the loss of thousands of militaries and civilian lives. The relationship between rules and acts, between the ideal of the Charter and the acts of warfare, generally dominated by the instrumental concept of linear causality, is, here too, under discussion.

With respect to the meaning of the category 'peacekeeping missions', we can observe that military operations take place, acts of war that are qualified as 'peacekeeping', legitimized and justified in the Charter by their just cause: maintaining or restoring peace and security. Nevertheless, these peacekeeping missions themselves have become *observable phenomena of warfare*. This confusing situation triggered the question: is a peacekeeping mission a state of peace, a state of war, or an armed conflict not recognized as war?[22] To put it differently, what is the institutional meaning of a peacekeeping mission?

Semiotic Groups

If war is considered to be a legal institution and acts of war to be institutional facts, the following conclusions can be made with respect to the construction of meaning in the case study. Actual observable warfare, in the institutional view, generates institutional meaning. How is this meaning generated? Within the three dimensions of Ruiter's model, i.e., a set of rules, acts of officials and judges, and patterns of behaviour in social practice, in particular the acts of officials, and in case of a conflict the acts of the judiciary are pivotal. In terms of semiotic groups, which make sense of law in ways sufficiently distinct from other groups, two semiotic groups can be distinguished here: the Public Prosecutor, on the one hand, and the judges, on the other. Within these groups external information will be transformed in the system's own distinctions and meanings. Both professional groups attributed two completely different institutional meanings to the same acts of war. The Public Prosecutor insisted on Article 307 of the Penal Code, valid law in times of peace, the judges of the Districts Court and the Court of Appeal insisted on the Rules of Engagement, valid rules in situations of war. The conflict before both Courts

[22] The law of war applies only to the two last-mentioned categories.

concentrated on the choice between two different rules with an opposite meaning. Although the judges, as one semiotic group, attributed their institutional meaning to the conduct; *their ascendancy* over the Public Prosecutor, as the other semiotic group, remained unclear. However, following Teubner's concept of law as an 'autopoietic system' comprising different sub-systems, it may be concluded that the degree of autonomy of a semiotic group correlates with its power to impose its own interpretation on other groups.

Final Remarks

By applying an institutional analysis to the case study on the shift in the concept of war, the 'flows' of rule information and the creation of meaning in this flow were shown. The question was posed of whether law, generally seen as a goal-orientated instrument that is linear causal in character, involves reciprocal elements of meaning attribution. This question had to be answered in the affirmative.

In the relationship between observable conduct and the indiscernible rule as a mental entity, professional groups within the legal system play an important role. These groups, which fit in the notion of 'semiotic groups', reform and interpret observable acts as external information and transform its meaning into the group's own codes. The semiotic-pragmatic structure of institutional legal theory presupposes (and leaves room for) the existence of such an interpreting group, in order to explain the complex situation of interpreting acts in the light of normative institutions. An analysis of the case study showed that a situation of actual warfare, can be interpreted in two different legal meanings by two different groups, namely, (i) a peacekeeping mission, involving actual and observable acts of warfare, is a *situation of peace*, to which the Penal Code, valid law in times of peace, is applicable, and (ii) a peacekeeping mission, involving actual and observable acts of warfare, is a *situation of war*, to which the law of war is applicable.

Abandoning the idea of goal-oriented legislation in favour of the idea of legislation as a form of institutional landscaping, means that the problem of its effectiveness and its flow of information is put in a different light. The idea of legislative institution-building, the interplay between normative and real institutions, and the reciprocally constructed meaning by officials and judges as different semiotic groups, disentangles the complexity in the field of war and law and offers an opportunity to study legal texts and legal discourse.

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References

1. Jackson, B.S. 1985. *Semiotics and legal theory*. London and Boston: Routledge and Kegan Paul.
2. MacCormick, N., and O. Weinberger. 1986. *An institutional theory of law*. Dordrecht and Boston: Kluwer Academic Publishers.

3. Olivecrona, K. 1971. *Law as fact*. London: Stevens & Sons.
4. Tamanaha, B.Z. 2006. *Law as a means to an end. Threat to the rule of law*. Cambridge: Cambridge University Press.
5. Pound, R. 1965. Contemporary juristic theory. In *Introduction to jurisprudence*, ed. D. Lloyd, 247–252. London: Stevens & Sons.
6. van Hoecke, M. 2002. *Law as communication*. Oxford: Hart Publishing.
7. Teubner, G. 1983. Substantive and reflexive elements in modern law. *Law and Society Review* 17(2): 239–285.
8. Teubner, G. 1993. *Law as an autopoietic system*. Oxford: Blackwell Publishers.
9. Kelsen, H. 1967. The pure theory of law. (trans: Knight, M.). Berkeley & Los Angeles: University of California Press.
10. MacCormick, D.N. 1973. *Law as institutional fact*. Edinburgh: Edinburgh University Press.
11. Searle, J.R. 1969. *Speech acts*. Cambridge: Cambridge University Press.
12. Ruiter, D.W.P. 2001. *Legal institutions*. Dordrecht and Boston: Kluwer Academic Publishers.
13. Ogden, C.K. 1942. *Bentham's theory of fictions*. New York: Harcourt, Brace and Company.
14. Wittgenstein, L. 1953. Philosophical investigations (trans: Anscombe, G.E.M.). New York: The MacMillan Company.
15. Figueroa, E. 1994. *Sociolinguistic metatheory*. New York: Pergamon.
16. Jackson, B.S. 1999. Legislation in the semiotics of law. In *Semiotics and legislation. Jurisprudential, institutional and sociological perspectives*, ed. H. van Schooten, 5–26. Liverpool: Deborah Charles Publications.
17. Moore, S.K. 1973. Law and social change: The semi-autonomous social field as an appropriate subject of study. *In: Law and Society Review* 7: 719–746.
18. MacIntyre, A. 1985. *After virtue: A study in moral theory*. London: Duckworth.
19. Grotius, H. 1625/1993. *De Jure Belli as Pacis. Libri Tres.* Aalen: Scientia Verlag.
20. Greenwood, C. 1987. The concept of war in modern international law. *International and Comparative Law Quarterly* 36: 283–306.
21. de Jong, H.G. 1990. De oorlogsverklaring in het internationale en het nationale recht (The Declaration of War in International and National Law). *RM Themis* 3: 100–114.
22. van Schooten, H. 2004. On war, peace and armed conflict. *International Journal for the Semiotics of Law* 17: 169–183.
23. van Schooten, H. 2008. Shifts in the concept of war. New war terminology and its legal consequences. In *Diversity and tolerance in socio-legal context: Explorations in the semiotics of law*, ed. A. Wagner, and V.K. Bhatia. Aldershot: Ashgate Publishing Company.
24. van Schooten, H. 2008. The legal abolition of war: Lip service to the cause of peace? *Tilburg Law Review* 14: 363–378.
25. van Schooten, H. 2007. A peacekeeping missions as a new category of war? An institutional analysis. In *Legislation in context: Essays in jurisprudence*, ed. L. Wintgens, 134–153 Aldershot: Ashgate Publishing Company.
26. Mackinlay, J., and J. Chopra. 1992. Second generation multinational operations. *Washington Quarter* 15: 113–134.
27. Ruiter, D.W.P. 1999. Legislation and legal institutions. In *Semiotics and legislation. Jurisprudential, institutional and sociological perspectives*, ed. H. van Schooten, 139–158. Liverpool: Deborah Charles Publications.
28. Hervey, S. 1982. *Semiotic perspectives*. London: George Allen & Unwin.
29. van Schooten, H. 1999. *Semiotics and legislation. Jurisprudential, institutional and sociological perspectives*. Liverpool: Deborah Charles Publications.
30. Searle, J.R. 1979. *Expression and meaning. Studies in the theory of speech acts*. Cambridge: Cambridge University Press.